(2)

No. 94-1128

RECD
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

FLORIDA CELLULAR MOBIL COMMUNICATIONS CORPORATION,

Petitioner,

v.

FEDERAL COMMUNICATIONS COMMISSION,
WENDY C. COLEMAN D/B/A/ WCC CELLULAR,
JAJ CELLULAR PARTNERSHIP,

Respondents.

On Petiton for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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RESPONDENT' S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in affirming an order of the Federal Communications Commission dismissing Petitioner's cellular license application for violating the Commission's multiple ownership rule where: (1) the rule clearly prohibited anyone from holding any ownership interest in competing non-wireline cellular license applications; (2) Petitioner knew and understood the rule; and (3) one of Petitioner's shareholders nevertheless held dual ownership interests in competing applications.

TABLE OF CONTENTS

Page No.

QUESTION PRESENTED i

TABLE OF AUTHORITIES iv

CONSTITUTION, STATUTES, AND REGULATIONS 2

STATEMENT OF THE CASE 2

REASONS FOR DENYING THE WRIT 7

I. THIS CASE DOES NOT PRESENT IMPORTANT OR NOVEL QUESTIONS OF LAW 7

A. The FCC's Cellular Cross Ownership Rule Does Not Impose Strict Vicarious Liability On Cellular Applicants 8

B. The Court Of Appeals Correctly Found That The Commission's Order Dismissing Petitioner's Application Did Not Violate Petitioner's Due Process Rights 9

1. Petitioner did not exercise due diligence to eliminate its multiple ownership interests in competing cellular applicants 10

2. The Commission's strict application of its multiple interest rule did not violate Petitioner's procedural due process rights 12

3. The Commission's strict enforcement of its multiple interest rule is rationally related to the rule's purpose . . . 16

C. The Court Of Appeal's Decision Affirming The Commission's Strict Enforcement Of Its Regulations Is Consistent With Established Precedent 18

D. The Commission's Enforcement Of Its Cellular Cross-Ownership Rule Is Consistent With Its Authority Under The Communications Act 20

CONCLUSION 23

TABLE OF AUTHORITIES

Court Decisions:

Adickes v. S.H. Kress & Co., 398 U.S. 144 (1970) . . . 20

Airline Pilots Ass'n Int'l v. Quesada, 276 F.2d 892 (2d Cir. 1960) 13

Ashbacker Radio Corp. v. F.C.C., 326 U.S. 327 (1945) 14

Board of Regents v. Roth, 408 U.S. 564 (1972) 14

Cafeteria and Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) 14

Calero-Toledo v. Pearson Yacht Leasing Co., 416 U.S. 663 (1974) 11

City of Angels Broadcasting, Inc. v. F.C.C., 745 F.2d 656 (D.C. Cir. 1984) 19

Conley Elecs. Corp. v. F.C.C., 394 F.2d 620 (10th Cir. 1968) 8, 13

Delta Air Lines, Inc. v. August, 450 U.S. 346 (1981) . . 20

Dixon v. Love, 431 U.S. 105 (1977) 14

Duke Power Co. v. Carolina Environmental Study Group, Inc., 438 U.S. 59 (1978) 17

F.C.C. v. National Citizens Comm. for Broadcasting et al., 436 U.S. 775 (1978) . . . . . *passim*

Florida Inst. of Technology v. F.C.C., 952 F.2d 549 (D.C.Cir. 1992) 19

Goldsmith v. United States Board of Tax Appeals, 270 U.S. 117 (1926) 14

JEM Broadcasting Co., Inc. v. F.C.C., 22 F.3d 320 (D.C. Cir. 1994) 20

Louis Pizitz Dry Goods Co. v. Yeldell, 274 U.S. 112 (1927) 12

Moving Phones Partnership, L.P. v. F.C.C., 998 F.2d 1051 (D.C. Cir. 1993), *cert. denied*, 114 S.Ct. 1369 (1994) 19

Nebbia v. New York, 291 U.S. 502 (1934) 17

Northwestern Ind. Tel. Co., Inc. v. F.C.C., 872 F.2d 465 (D.C. Cir. 1989) 21

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991) 11

Pontchartrain Broadcasting Co. v. F.C.C., 15 F.3d 183 (D.C. Cir. 1994) 20

Royce Int'l Broadcasting Co. v. F.C.C., 820 F.2d 1332 (D.C. Cir. 1987) 20

Russian River Vintage Broadcasting v. F.C.C., 5 F.3d 1518 (D.C. Cir. 1993) 20, 21

Singleton v. F.C.C., 952 F.2d 1444 (D.C. Cir. 1992) . . 13

Udall v. Tallman, 380 U.S. 1 (1985) 10

United States v. Mendenhall, 446 U.S. 544 (1980) 20

United States v. Park, 421 U.S. 658 (1975) 11

United States v. Storer Broadcasting Co., 351 U.S. 192 (1956) . . . . . *passim*

West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937) . 17

Youakim v. Miller, 425 U.S. 231 (1976) 20

Administrative Decisions:

Application of Cells Co., et al., 7 FCC Rcd. 2143, *aff'd sub nom., Moving Phones Partnership L.P. v. F.C.C.*, 998 F.2d 1051 (D.C. Cir. 1993), *cert. denied*, 114 S. Ct. 1369 (1994) 19

Cellular Lottery Order, 98 F.C.C.2d 175 (1984) 13

Memorandum Opinion And Order On Further Reconsideration, 59 Rad. Reg. 2d (P&F) 407 (1985) 16

Petitions for Reconsideration of the Return of Round IV Cellular Applications for Miscellaneous Defects, 103 F.C.C.2d 414 (1986) 16, 18

Progressive Cellular III B-3, 6 FCC Rcd. 596, *recon. denied*, 6 FCC Rcd. 7178 (1991), *aff'd mem.*, 986 F.2d 546 (D.C. Cir.), *cert. denied*, 114 S.Ct. 174 (1993) 18

REM Communication, 3 FCC Rcd. 3705 (1988) . . 13, 19

Third Report and Order, 4 FCC Rcd. 2440 (1988) 6, 15, 17

Statutes:

47 U.S.C. § 154 21

47 U.S.C. § 301 14

Regulations:

47 C.F.R. § 22.20 . . . . . 2, 13

47 C.F.R. § 22.921(b) 3

Legislative History:

Conference Report on Communication Amendments Act of 1982, Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 39 (1982) 21

Miscellaneous:

William L. Prosser, *Law of Torts* § 69 (4th ed. 1983) . . 8

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FEDERAL COMMUNICATIONS COMMISSION, WENDY C. COLEMAN D/B/A/ WCC CELLULAR, JAJ CELLULAR PARTNERSHIP,
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RESPONDENT'S BRIEF IN OPPOSITION

Respondent Wendy C. Coleman d/b/a WCC Cellular respectfully requests that the Court deny the Petition for a Writ of Certiorari.

CONSTITUTION, STATUTES, AND REGULATIONS

Relevant statutes and regulations are set forth in Petitioner's Petition for Certiorari, with the exception of 47 C.F.R. § 22.20, which provides, in pertinent part, as follows:

* * * * *

Defective Applications.

(a) Unless the Commission shall otherwise permit, an application will be unacceptable for filing and will be returned to the applicant with a brief statement as to the omissions or discrepancies if:

* * * * *

(2) The application does not comply with the Commission's rules, regulations, specific requirements for additional information, or other requirements.

* * * * *

STATEMENT OF THE CASE

Respondent, Wendy C. Coleman, d/b/a WCC Cellular ("WCC") agrees with the Statement of the Case set forth in the Response filed by Respondent Federal Communications

Commission ("FCC").[1] Respondent provides the following additional statement concerning a significant issue raised below but not addressed by Petitioner.

The Commission's "multiple interest" rule provides that no person may own an interest in more than one application for a non-wireline cellular license in Rural Service Area (RSA) markets.[2] At the time Florida Cellular filed its application for the non-wireline cellular license in Maryland 2 (Kent) RSA No. 468 ("MD-2"), one of its shareholders held an interest in another applicant for the same MD-2 RSA non-wireline cellular license.[3] Because that shareholder's dual interest in competing applicants violated the multiple interest rule, the Commission dismissed Florida Cellular's application.[4]

Although it was twice rebuffed by the Commission on reconsideration, and turned down by the court of appeals, the fundamental element of Petitioner's argument has been, and continues to be, its alleged misunderstanding of the scope

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[1]WCC also respectfully directs the Court's attention to the thorough and succinct Statement of the Case set forth in the opinion below. Florida Cellular Mobil Communications Corporation ("Florida Cellular") Petition for Certiorari, Appendix ("Pet. Appx.") at 5a - 7a.

[2]47 C.F.R. § 22.921(b) provides in pertinent part that "[f]or Rural Service Areas, no party to a non-wireline application shall have an ownership interest, direct or indirect, in more than one application for the same rural service area, including an interest of less than one percent."

[3]Pet. Appx. at 6a. The shareholder, Yerger Yandell, held a five percent interest in Kudzu Cellular Partnership ("Kudzu"). *Id.*

[4]Pet. Appx. at 7a.

and application of the Commission's cellular multiple interest rule. Specifically, Petitioner has argued that, despite the express terms of the rule, it did not understand that the rule prohibited multiple interests held by minority shareholders in competing corporate applicants. Indeed, Florida Cellular argued below that it had no notice or understanding that the rule would prohibit Yandell's dual interest in Florida Cellular's and Kudzu's applications.[5] Florida Cellular's professed ignorance or misunderstanding of the rule was, however, a misrepresentation.

On March 7, 1994, WCC sought leave to supplement the appendix in the Court of Appeals with a copy of a letter written by counsel for Florida Cellular on August 21, 1992.[6] In that letter, Petitioner's counsel recounted not only the details of the multiple interests held by shareholders of Petitioner, but rendered an analysis that demonstrated a complete understanding of the Commission's multiple interest rule as applied to minority shareholders:

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[5]Florida Cellular Reply Brief at 6, 16, *Florida Cellular Mobil Commun. Corp. v. F.C.C.* (D.C. Cir., filed Feb. 25, 1994) (Docket No. 92-1664).

[6]Florida Cellular vehemently opposed Respondent WCC's efforts to supplement the appendix, moving to strike the supplement and suggesting that WCC be sanctioned. Motion to Strike 'Motion to Supplement Appendix' and 'Supplemental Appendix' and Contingent Request for Opportunity to File Supplemental Brief, *Florida Cellular Mobil Commun. Corp. v. F.C.C.* (D.C. Cir., filed Mar. 11, 1994) (Docket No. 92-1664). Without waiting for WCC's response, the court denied Florida Cellular's motion in its entirety and supplemented the appendix with the letter as requested. Order, *Florida Cellular Mobil Commun. Corp. v. F.C.C.* (D.C. Cir., Mar. 16, 1994) (Docket No. 92-1664). A copy of the Letter is attached hereto as Respondent WCC's Appendix ("WCC Appx.").

In May 1988 the FCC released several orders in the rural cellular rulemaking docket, finalizing the rules governing RSA applications, and established the initial RSA filing dates, which were to begin July 13, 1988. Among the rules adopted in May 1988 was a rule prohibiting *any* cross-ownership among competing applicants. Counsel advised the companies that ownership changes would be needed to comply with the new rules against cross-ownership below the former 1% threshold.

Based on this advice, in June 1988, there were various changes in the ownership of the two companies, as the result of which any common ownership between the companies was eliminated a month before the RSA cellular filings were scheduled to begin.

* * * * *

Under the rules applying to MSA cellular filings, interests in multiple applications *by shareholders* owning less than 1% were permitted. *The ownership changes took place in direct response to the FCC's May [1988] promulgation of a rule prohibiting such*

common ownership for the RSA applications that were to be filed starting in July 1988.[7]

Florida Cellular's explanation was consistent with the interpretation advanced by the Commission when it adopted the rules in 1988. The Commission explicitly amended its rules "to prohibit non-wireline RSA applicants from having *any* ownership interests, including those of less than one percent, in more than one application in the market."[8] Through this supplement to the appendix in the court of appeals, WCC demonstrated that the Florida Cellular understood the meaning and application of the Commission's multiple interest rule. Thus, Petitioner's failure to eliminate the multiple ownership interests of one of its shareholders in the MD-2 market compelled dismissal of its application pursuant to 47 C.F.R. § 22.20(a)(2). Florida Cellular's documented understanding belies its assertion that the Commission's rule was ambiguous or the dismissal was anything but proper and consistent with due process.

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[7]WCC Appx. at pp. 5a, 8a (Initial emphasis in original; subsequent emphasis supplied). Attached to this letter were exhibits listing Petitioner's shareholders and the adjustments in ownership made to comply with Section 22.921(b)(1).

[8]Amendment of the Commission's Rules for Rural Cellular Service, *Third Report and Order,* 4 FCC Rcd. 2440, 2443 (1988) (emphasis in original) (hereinafter "*Third Report and Order*").

REASONS FOR DENYING THE WRIT

I. THIS CASE DOES NOT PRESENT IMPORTANT OR NOVEL QUESTIONS OF LAW.

Contrary to Petitioner's assertions, this case does not involve the imposition of "strict vicarious liability" on a wholly innocent corporation nor does it implicate Petitioner's right to due process. The cellular multiple interest rule does not hold anyone "liable" for "wrongful acts" of another; rather, the rule simply establishes certain qualifications for cellular applicants which must be met before an application can be accepted or a cellular license awarded.

Even indulging Petitioner's argument that the rule somehow imposes liability on cellular license applicants, the court below correctly found that Petitioner's due process rights were not violated. Petitioner knew and understood the rule and Petitioner did not eliminate its multiple ownership interests before filing its application. Moreover, the Commission's strict enforcement of the rule is rationally related to the rule's dual purpose - elimination of speculation in the non-wireline cellular application process and expediency in awarding cellular licenses.

A. The FCC's Cellular Cross Ownership Rule Does Not Impose Strict Vicarious Liability On Cellular Applicants.

Vicarious liability, rooted in tort law, is the imposition of liability upon one party for a wrong committed by another party because of some relationship between the two.[9] Petitioner's argument is fundamentally flawed because Section 22.921(b)(1) does not impose liability on cellular applicants for another party's wrongdoing. Rather, the cellular multiple interest rule conditions receipt of a benefit on the fulfillment of certain clearly defined conditions.

A license is a privilege granted by the government. This Court has specifically stated that an administrative agency may promulgate rules that have the effect of denying licenses to applicants who do not meet clearly defined conditions.[10] The cellular multiple interest rule limits qualified applicants to those parties that do not have ownership interests in more than one cellular application in one RSA. If any individual has an interest in more than one application, then those applications are defective and cannot

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[9]*See* William L. Prosser, *Law of Torts* § 69 (4th ed. 1983).

[10]*United States v. Storer Broadcasting Co.*, 351 U.S. 192 (1956) (upholding FCC rules denying broadcast licenses to applicants with direct or indirect interest in other stations beyond a limited number); *see also F.C.C. v. National Citizens Comm. for Broadcasting et al.*, 436 U.S. 775, 791 (1978). There is no question that the Government may impose reasonable restrictions on licensees. *Conley Elecs. Corp. v. F.C.C.*, 394 F.2d 620, 625 (10th Cir. 1968), *cert. denied*, 393 U.S. 858 (1968) (quoting *Air Line Pilots Ass'n, Int'l v. Quesada*, 276 F.2d 892 (2d Cir. 1960)), ("privileges are held subject to limitations that may reasonably be imposed upon them in the public interest").

be accepted or granted. The fact that a corporate applicant's application is unacceptable or defective does not amount to some sort of "liability" for someone else's wrongdoing. It only means that the applicant did not fulfill the conditions necessary to participate in the cellular licensing process.[11] Accordingly, the fact that the multiple interest rule applies equally to individual and corporate applicants does not render any subsequent dismissal "vicarious" in nature. Florida Cellular never met the qualifications necessary for its application to be accepted, and thus the Commission properly dismissed its application.

B. The Court Of Appeals Correctly Found That The Commission's Order Dismissing Petitioner's Application Did Not Violate Petitioner's Due Process Rights.

Even indulging Petitioner's theory of "strict vicarious liability" for the moment, Petitioner's argument that application of the Commission's multiple interest rule violates Petitioner's due process rights must fail. First, the lower court correctly affirmed the Commission's finding that Petitioner's lack of due diligence was partly to blame for the failure to comply. Second, the Commission's strict enforcement of the multiple interest rule did not deprive Petitioner of procedural due process. Finally, the Commission's multiple interest rule complies with due process because it is rationally related to the rule's dual purpose: elimination of speculation in the non-wireline

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[11]By the very nature of the business, shareholders of the applicant -- and not the applicant itself -- are the ones who would hold multiple interests and thus violate the rule. Accordingly, any interpretation of the rule that would prohibit dismissal where there are multiple interests held by shareholders would result in essentially no rule at all.

cellular application process and expedient cellular licensing in the public interest.

1. Petitioner did not exercise due diligence to eliminate its multiple ownership interests in competing cellular applicants.

Affording substantial and proper deference to the Commission's findings,[12] the court below agreed with the Commission that Petitioner's lack of due diligence was partly to blame for its failure to qualify for a license.[13] The court specifically held that the Commission may, without violating due process, dismiss an application that does not comply with Commission rules when the applicant's lack of due diligence is at least partly to blame for the failure to comply.[14] As noted by the court, its holding is consistent with its prior decisions affirming the Commission's authority to disallow

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[12] *Udall v. Tallman*, 380 U.S. 1, 16-17 (1985).

[13] Pet. Appx. at 16a - 17a. The court found that Petitioner failed to notify at least one of its shareholders, Yerger Yandell, of its intent to file a non-wireline cellular application for the MD-2 RSA or of the prohibition on owning multiple interests in competing applications. Pet. Appx. 6a. Although Mr. Yandell had moved his personal residence three blocks, Petitioner was alerted to Yandell's move when one of his shareholder notices was returned to Petitioner marked "Unable to deliver - no forwarding address." Pet. Appx. 5a -6a. Moreover, Yandell remained listed in the telephone directory, and after Petitioner's selection in the lottery, Petitioner updated its shareholder mailing list and obtained Yandell's new address. Pet. Appx. at 6a. As a direct result of Petitioner's inadequate efforts to locate Yandell, at the time Petitioner filed its application, Mr. Yandell held a .85% interest in Petitioner and a 5% interest in Kudzu, a competing applicant. *Id.*

[14] Pet. Appx. at 17a.

amendments to applications where the applicant failed to satisfy due diligence requirements.[15]

Contrary to Petitioner's suggestion, the court of appeal's decision is entirely consistent with the relevant precedent concerning strict vicarious liability, including that cited by Petitioner. The cases cited by Petitioner do not, as Petitioner suggests, "embrace the principle that when a regulated party is innocent of wrongdoing and 'powerless to prevent' a violation by others, no punishment or liability can constitutionally be imposed." Petition For Certiorari ("Pet. Cert.") at 8. In fact, all of the cases cited by Petitioner stand for the proposition that "put[ting] the burden of acting at hazard upon a person *otherwise innocent* but standing in a responsible relation to a public danger" is *not* unfair and does *not* violate due process even where the punishment is criminal in nature.[16] Thus, Petitioner's attempts to sway this court with allegations of its innocence are legally irrelevant and insupportable.

What is relevant to a due process analysis of vicarious liability is Petitioner's failure to do all that it could have done to prevent the multiple interest violation. As this Court stated in *United States v. Park*, "corporate agents vested with the responsibility, and power commensurate with that

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[15] *Id.* (citing *Pontchartrain Broadcasting Co. v. F.C.C.*, 15 F.3d 183, 184 (D.C. Cir. 1994); *Marin TV Servs. Partners, Ltd. v. F.C.C.*, 936 F.2d 1304, 1306 (D.C. Cir. 1991); *Royce Int'l Broadcasting Co. v. F.C.C.*, 820 F.2d 1332, 1336 (D.C. Cir. 1987)).

[16] *United States v. Park*, 421 U.S. 658, 668 (1975) (emphasis added) (citation omitted); *see also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 690 (1974) (finding that party had not shown that it did all that it reasonably could have to avoid the illegal act).

responsibility, to devise whatever measures are necessary to ensure compliance with the Act bear a 'responsible relationship' to, or have a 'responsible share' in, violations."[17] As explained above, the Commission found and the court of appeals affirmed, that Petitioner did not do all that it could to prevent a violation of the multiple interest rule.[18] Accordingly, its application was properly dismissed.

Thus, notwithstanding Petitioner's vain attempts to persuade this court that its case is novel or important, in fact, the Commission's application of its multiple interest rule is consistent with established precedent concerning strict vicarious liability. *See infra*, Part C.

2. The Commission's strict application of its multiple interest rule did not violate Petitioner's procedural due process rights.

The due process clause of the Fifth Amendment does not preclude the Commission from promulgating licensing standards through the rule making process and enforcing them generally without engaging in case by case

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[17]421 U.S. at 672.

[18]"The extension of the doctrine of liability without fault to new situations to attain a permissible legislative object is not so novel in the law or so shocking 'to reason or to conscience' as to afford in itself any ground for the contention that it denies due process of law." *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112, 115 (1927). After all, the literal translation of *respondeat superior* is simply, "look to the man higher up." Prosser at 459.

adjudication.[19] In this case, the Commission adopted a clear and unambiguous rule prohibiting applicants from owning multiple interests, including those of less than 1%, in non-wireline applications for the same RSAs. Section 22.20(a)(2) of the Commission's rules unambiguously states that defective applications will be dismissed. Indeed, the certification that all cellular applicants are required to give specifically states that applications that do not comply with the Commission's cellular application rules "shall be dismissed without further consideration." Pet. Appx. at 10a.

Petitioner suggests that due process requires the Commission to conduct a fact specific inquiry into the intent of an applicant before dismissing an application. However, as a tentative selectee in the cellular application process, Petitioner's entitlement to procedural safeguards was extremely limited.[20] Long ago this Court established that

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[19]*Conley Elecs. Corp.*, 394 F.2d at 625; *Airline Pilots Ass'n*, 276 F.2d at 896 (*citing Storer Broadcasting*, 351 U.S. at 205).

[20]*See Cellular Lottery Order*, 98 F.C.C.2d 175 (1984) (selectee is not issued license unless and until staff reviews application and verifies selectee is qualified). The Commission reviews cellular license applications at three stages. The initial stage constitutes the "letter perfect" review; the second stage is the "acceptable for filing" review; and the final stage is the "public interest" review. *Singleton v. F.C.C.*, 952 F.2d 1444, 1446 (D.C. Cir. 1992). Although many applications may pass the "letter perfect" standard for crossing the threshold at the Commission's filing desk, the second review under the "acceptable for filing" standard, set forth in 47 C.F.R. § 22.20(a), is more rigorous. Indeed, although certain applications may pass the "letter perfect" stage, review of applications for filing continues even after lottery selection and designation of an applicant as a tentative selectee. *REM Communication*, 3 FCC Rcd. 3705 (1988). Accordingly, even after an applicant is designated as a tentative selectee for a license, its application is still subject to review and dismissal for noncompliance with the Commission's rules.

based on the language and purpose of the Communications Act, "no person is to have anything in the nature of a property right as a result of the granting of a license."[21] Accordingly, in the particular instances presented here, Petitioner's claim to a property interest and a pre-termination hearing is insupportable.[22]

Moreover, due process of law does not require a hearing "in every conceivable case of government impairment of private interest."[23] In an administrative setting, where "government official[s] [are] given the power to make discretionary decisions under a broad statutory standard, case-by-case decisionmaking may not be the best way to assure fairness."[24] Often, the decision to use objective rules provides more precise notice of what conduct is required.[25]

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[21]*Ashbacker Radio Corp. v. F.C.C.*, 326 U.S. 327, 333 n. 6 (1945) (quoting *F.C.C. v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940)); 47 U.S.C. § 301.

[22]To have a property interest in a benefit protected by due process, a person must have more than a unilateral expectation of it. *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972). Petitioner's multiple ownership interests in competing applications for the MD-2 RSA disqualified its application from participation in the lottery. Thus, even though Petitioner was designated the "tentative selectee" for the license, Petitioner never held a property interest in the license because its application was at all times deficient. *Goldsmith v. United States Board of Tax Appeals*, 270 U.S. 117, 123 (1926) (to have protectable property interest at application stage must be "within the class of those entitled . . . under the . . . rules.")

[23]*Cafeteria and Restaurant Workers Union v. McElroy*, 367 U.S. 886, 894 (1961).

[24]*Dixon v. Love*, 431 U.S. 105, 115 (1977).

[25]*Id.; see also Storer Broadcasting Co.*, 351 U.S. at 202-206.

Accordingly, where, as here, rules of general application are promulgated in a valid rule making proceeding, those rules may be generally applied without individual adjudicatory hearings.

Finally, the Commission afforded all cellular applicants, including Petitioner, adequate notice of the rule's requirements and the consequences of noncompliance. Petitioner claims that the Commission did not clearly define the scope of the rule because it did not define "party to a non-wireline application."[26] In fact, the scope of the rule was clear from the text of the rule and the order adopting the rule,[27] as evidenced by Petitioner's own understanding of the rule prior to filing its application.[28] Moreover, contrary to Petitioner's suggestions, all applicants were clearly notified that non-conforming applications were subject to dismissal. Section 22.20(a)(2) states that applications not in compliance with Commission rules will be dismissed. Further, all applicants, including Petitioner, were required to sign a certification that explained that non-conforming applications

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[26]Pet. Cert. at 19. In challenging this phrase on notice grounds, Petitioner has slyly avoided the court of appeals rejection of a similar argument. In the court of appeals, Petitioner argued for the first time that Mr. Yandell was not a "party to the application," and therefore not subject to the multiple interest rules. Although Mr. Yandell was a "party," even under Florida Cellular's theory, the court did not consider Petitioner's argument because Petitioner failed to raise it before the Commission. Pet. Appx. at 17a.

[27]In its order adopting the rule, the Commission clearly explained that it intended "to prohibit non-wireline RSA applicants from having *any* ownership interest, including those of less than 1%, in more than one application in a market." *Third Report and Order*, 4 FCC Rcd. 2440, 2443 (1988) (emphasis added).

[28]*See supra* , pp. 4-6.

would be dismissed.[29] Finally, the Commission's consistent and strict enforcement of its qualification and multiple interest rules further notified all applicants that non-conforming applications would be subject to dismissal.[30]

3. The Commission's strict enforcement of its multiple interest rule is rationally related to the rule's purpose.

Even if Petitioner held a protectable property interest in the license, the Commission need only demonstrate that its strict enforcement of its licensing qualifications is reasonably related to permissible public-interest goals.[31] This standard is akin to the standard applied by courts to economic regulations.[32] And, as demonstrated by the case law cited by Petitioner, this Court has consistently upheld economic

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[29]Pet. Appx. at 10a.

[30]*See, e.g. Memorandum Opinion And Order On Further Reconsideration*, 59 Rad. Reg. 2d (P&F) 407, 410 (1985) ("[T]he tentative selectee's application will be carefully reviewed to ensure its compliance with the cellular application standards and *will be dismissed* for failure to [do] so."); *Petitions for Reconsideration of the Return of Round IV Cellular Applications for Miscellaneous Defects*, 103 F.C.C.2d 414, 419 (1986) ("*Round IV Cellular Applications*") (dismissing three applications for failure to comply with multiple ownership prohibition).

[31]*F.C.C. v. National Citizens Comm. for Broadcasting*, 436 U.S. 775, 794 (1978).

[32]Petitioner's claim that courts construing equal protection challenges apply "essentially the same" rational relationship analysis as courts examining economic regulations is transparent. Obviously Petitioner would like to rely on equal protection cases in which the Court has struck down certain regulations. However, there is no reason for the Court to rely on equal protection precedent when more relevant precedent concerning due process challenges to economic regulations is abundant.

regulations as long as they are "neither arbitrary nor discriminatory."[33] In fact, there is a traditional presumption of constitutionality accorded to economic regulations.[34]

The Commission's cellular multiple interest rule was developed to deter speculation in the licensing process and to avoid delays in granting authorizations.[35] The rule's dual purpose clearly satisfies the public interest standard.[36] The Commission's decision to prohibit any multiple interests in competing applicants for non-wireline RSAs stemmed from its experience processing applications for metropolitan cellular markets. In those markets, the FCC found that the filing of applications by speculators consumed staff time and resources and ultimately delayed service to the public.[37] The Commission thus prohibited wireline applicants from holding multiple ownership interests in the same RSA, including those of less than 1%, to deter speculation and thereby,

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[33]*See, e.g., Nebbia v. New York*, 291 U.S. 502 (1934) (upholding price fixing regulations); *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937) (upholding minimum wage law).

[34]*Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 83 (1978).

[35]*Third Report and Order*, 4 FCC Rcd. at 2440.

[36]*See Storer Broadcasting Co.*, 351 U.S. at 205 ("We do not think Congress intended the Commission to waste time on applications that do not state a valid basis for a hearing"); *National Citizens Comm. for Broadcasting*, 436 U.S. at 794 (finding diversification to be legitimate goal underlying licensing regulations).

[37]*Third Report and Order*, 4 FCC Rcd. at 2440.

expedite cellular licensing.[38] Only strict enforcement of the rule's requirements will serve the FCC's ultimate goal of expediency in the cellular licensing process.

C. The Court Of Appeal's Decision Affirming The Commission's Strict Enforcement Of Its Regulations Is Consistent With Established Precedent.

The fact that the lower court's decision follows an unbroken line of authority is further support for denying certiorari in this case. Petitioner's effort to elevate this case into one of judicial debate and constitutional importance should be rejected.

The Commission has consistently required strict compliance with its qualification and multiple interest rules. For example, in the *Progressive Cellular* proceeding, the Commission dismissed an application for violation of the multiple interest rule, notwithstanding an argument that the violation was unintentional.[39] Similarly, in the *Round IV Cellular* proceeding, the Commission rejected various excuses for violating the MSA multiple interest rule and found that an applicant "clearly and unambiguously" violated an explicit rule section, rejected claims that there was "reasonable confusion" as to application requirements, and dismissed three applications for violating the multiple interest rule.[40]

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[38]Petitioner's allegation that the purpose underlying the rule was solely to deter speculation is thus incomplete. *See* Pet. for Cert. at 14.

[39]*Progressive Cellular III B-3*, 6 FCC Rcd. 596, *recon. denied*, 6 FCC Rcd. 7178 (1991), *aff'd mem.*, 986 F.2d 546 (D.C. Cir.), *cert. denied*, 114 S.Ct. 174 (1993).

[40]*Round IV Cellular Applications*, 103 F.C.C.2d at 414, 418-20.

The Commission has also been consistently strict in its interpretation of other qualification rules. For example, in one group of cases, the Commission found that a number of applicants had violated the restrictions against alien ownership of cellular licenses and dismissed *all* of the affected applications.[41] In another case, the Commission found that even the failure to include a legible map of the service area disqualified an applicant and justified dismissal of the application.[42] In all of these decisions, the Commission strictly adhered to the literal meaning of the rules and offered no exemption for unintentional or inadvertent violations.

Moreover, the court of appeals has uniformly upheld the Commission's strict interpretations of its rules,[43] as well as the Commission's authority to dismiss non-conforming

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[41] *Application of Cells Co., et al.*, 7 FCC Rcd. 2143, *aff'd sub nom., Moving Phones Partnership L.P. v. F.C.C.*, 998 F.2d 1051 (D.C. Cir. 1993), *cert. denied* 114 S. Ct. 1369 (1994). In the *Moving Phones* decision, this Court rejected all applications in which alien partners had an interest and rejected efforts by the applicants to amend their applications to reflect that these alien partners could not "control" the partnership by way of restrictive agreements. *Moving Phones*, 998 F.2d at 1057. There, as here, the rules prohibited certain interests in applications and where the notice was clear, no exemption was available for even those violations that did not undermine the professed purpose of the alien ownership rule.

[42] *REM Communication*, 3 FCC Rcd. at 3705.

[43] *Florida Inst. of Technology v. F.C.C.*, 952 F.2d 549, 550 (D.C.Cir. 1992); *City of Angels Broadcasting, Inc. v. F.C.C.*, 745 F.2d 656, 663 (D.C. Cir. 1984).

applications.[44] And, this Court specifically upheld the Commission's authority to deny an application without further inquiry if a license applicant does not qualify under standards set forth in regulations, and does not proffer sufficient grounds for waiver or change of those standards.[45] Notwithstanding the numerous cases cited in its petition for certiorari, none of Petitioner's cases contradicts the decision of the court below. The fact that the decision below conforms with existing precedent further exemplifies why there is no need for additional review in this Court.

D. The Commission's Enforcement Of Its Cellular Cross-Ownership Rule Is Consistent With Its Authority Under The Communications Act.

Petitioner has raised two statutory arguments in its Petition that were not raised before the court of appeals or the Commission. For the first time, Petitioner argues that the Commission, in dismissing Petitioner's application, exceeded its authority under the Act and failed to comply with the Act's notice requirements. Pet. Cert. at 10 - 13. Generally the Court "does not decide questions not raised or resolved in the lower court."[46] Where, as here, the Commission has

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[44]*See, e.g. JEM Broadcasting Co., Inc. v. F.C.C.*, 22 F.3d 320, 329 (D.C. Cir. 1994); *Pontchartrain Broadcasting Co.*, 15 F.3d at 184; *Russian River Vintage Broadcasting v. F.C.C.*, 5 F.3d 1518, 1521 (D.C. Cir. 1993); *Royce Int'l Broadcasting Co. v. F.C.C.*, 820 F.2d at 1336.

[45]*National Citizens Comm. for Broadcasting*, 436 U.S. at 781.

[46]*Youakim v. Miller*, 425 U.S. 231, 234 (1976); *United States v. Mendenhall*, 446 U.S. 544, 551-52 n.5 (1980); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Delta Air Lines, Inc. v. August*, 450

not had the opportunity to consider the arguments, there is even greater reason for the court to ignore them.[47] Accordingly, these arguments should not be considered by this Court.

In any event, Petitioner's statutory arguments are entirely without merit. The Commission is granted broad authority under the Communications Act to promulgate rules in furtherance of the public interest.[48] Pursuant to that authority, the Commission may promulgate rules that contain licensing limitations, including limitations based on ownership interests and efficient administration.[49] In addition, Congress gave the Commission wide latitude to establish rules governing the selection of qualified applicants through the use of lotteries.[50] The Commission's rule limiting participation in the cellular license lottery to applicants not holding multiple ownership interests in competing applicants is precisely the type of licensing restriction within the Commission's power to promulgate. It is not, as Petitioner

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U.S. 346, 362 (1981) (finding that question presented in petition but not in court of appeals was not properly raised).

[47]*Northwestern Ind. Tel. Co., Inc. v. F.C.C.*, 872 F.2d 465, 470 (D.C. Cir. 1989) ("'courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice'") (quoting *Washington Ass'n for Television & Children v. F.C.C.*, 712 F.2d 677, 680-82 (D.C. Cir. 1983)); *Russian River Vintage Broadcasting*, 5 F.3d at 1521.

[48]47 U.S.C. § 154(i); *National Citizens Comm. for Broadcasting*, 436 U.S. at 794.

[49]*Storer Broadcasting*, 351 U.S. at 203.

[50]Conference Report on Communication Amendments Act of 1982, Conf. Rep. No. 97-765, 97th Cong., 2d Sess. 39 (1982).

asserts, an imposition of strict vicarious liability. *See supra*, Part I. Thus, the FCC acted within its statutory authority by enforcing a rule with which, plain and simply, Petitioner did not comply.

Petitioner's argument that the Commission failed to provide adequate notice of the scope and effect of its multiple interest rule must also fail. As demonstrated above, the notice provided by the Commission was entirely adequate for purposes of due process as well as the Communications Act. The fact that Petitioner knew and understood the rule's limitations further demonstrates the unambiguous character of the rule.

Finally, Petitioner was required to certify that it understood that non-compliance would lead to dismissal.[51] "It is enough that the FCC rules are clearly spelled out and applicants are on notice that their applications are subject to dismissal for failure to comply with these rules."[52] Nothing in any of Petitioner's claims merits review by this Court.

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[51]Pet. Appx. at 10a.

[52]Pet. Appx. at 13a.

CONCLUSION

For the foregoing reasons, the writ should be denied.

Respectfully Submitted,

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